

T1.11/3: 11/22

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions

of the United States Court of Customs and
Patent Appeals and the United States
Customs Court

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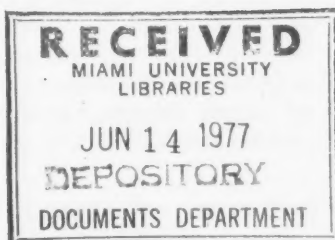
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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 77-136)

Inspection, Search, and Seizure—Customs Regulations amended

Sections 148.19, 162.21 and 162.41, Customs Regulations, pertaining to seizures by Customs officers, amended

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 148 — PERSONAL DECLARATIONS AND EXEMPTIONS

PART 162 — INSPECTION, SEARCH, AND SEIZURE

AGENCY: United States Customs Service.

ACTION: Final rule.

SUMMARY: This rule sets forth Customs policy that unless required by law merchandise should only be seized for Customs violations in those situations in which seizure is necessary to protect the revenue of the United States. A monetary penalty shall be the remedy for violations of laws enforced by Customs unless it is determined that seizure is necessary. These amendments are needed to clarify those situations in which a monetary penalty should be assessed against the violator rather than seizing the merchandise.

EFFECTIVE DATE: May 17, 1977.

FOR FURTHER INFORMATION CONTACT: Marvin M. Amernick, Attorney, Regulations and Legal Publications Division, 1301 Constitution Avenue, N.W., United States Customs Service, Washington, D.C. 20229 (202-566-8237).

U.S. Customs Service

Inventory Declaration

Form No. 100

Instructions: Complete this form for all goods imported into the United States.

Section 1: General Information. Provide details about the importer, consignee, and the goods being imported.

Section 2: Description of Goods. Provide a detailed description of the goods, including their quantity, value, and country of origin.

Section 3: Declaration

Part 1: Declaration of Importer. I hereby declare that the goods described herein are for my use or for the use of my business.

Part 2: Declaration of Consignee. I hereby declare that the goods described herein are for my use or for the use of my business.

Part 3: Declaration of Carrier. I hereby declare that the goods described herein are for my use or for the use of my business.

Section 4: Signature and Date. Sign and date this declaration.

Section 5: Remarks. Provide any additional information or remarks.

NOTE: This form is to be filled out by the importer, consignee, or carrier. It is not to be filled out by the customs officer. The goods described herein must be imported into the United States. A temporary permit will be issued for goods for exhibition or for other special purposes. These goods must be re-exported to the country of origin or to another country within the time specified. If the goods are not re-exported, they will be subject to the duties and taxes applicable to the goods.

EXPIRATION DATE: 12/31/2010

FOR FURTHER INFORMATION, CONTACT: U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20546-0001. Telephone: (202) 225-5000.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 162.21(a) of the Customs Regulations (19 CFR 162.21(a)) provides that any Customs officer having reasonable cause to believe that any law enforced by the Customs Service has been violated, making any property subject to forfeiture, shall seize such property if available.

While certain provisions of the Tariff Act of 1930, as amended, require seizure of merchandise for violations, other provisions authorize the forfeiture of either the merchandise or its value. For example, under the provisions of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), the entry, or attempted entry, of merchandise into the commerce of the United States by means of any false declaration subjects the merchandise or its value to forfeiture. Seizure of merchandise is not required; a claim for its value may be made.

Section 148.19 of the Customs Regulations (19 CFR 148.19) provides that a passenger who makes any false statement or engages in other conduct which causes a Customs officer to pass an article free of duty or at less than the proper amount of duty has violated section 592. Therefore, except as otherwise provided, the article involved must now be seized if it is available and seizure is practicable. If the article is not available for seizure or if seizure is impracticable, the domestic value of the article shall be demanded from the passenger.

Likewise, section 162.41(a) of the Customs Regulations (19 CFR 162.41(a)), provides that when merchandise or the value thereof is subject to forfeiture, the district director may elect to seize the merchandise or assess a claim for its domestic value. However, if the merchandise is in the possession of an innocent purchaser, it shall not be seized. In such cases, or when the merchandise is not available for seizure, the district director shall proceed to recover the domestic value of the merchandise.

The United States Customs Service is aware that seizure of property may be an unnecessarily harsh action. Seizure of merchandise may place an importer in the position of being unable to continue his business, or of breaching his contractual commitments with his customers causing him unwarranted financial losses.

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Recognizing the possible consequences that seizure of property may have in circumstances where absolutely prohibited importations are not involved, it is the position of the United States Customs Service that unless required by law, property should only be seized when it is necessary to protect the revenue.

In order to clearly set forth Customs policy in this regard, it has been determined that section 162.21(a) of the Customs Regulations should be amended to provide for assessment of a monetary penalty unless it is determined that seizure is necessary to protect the revenue. The revised language will remove any possible inference that this regulation compels seizure in all cases where the property that is subject to forfeiture is available for seizure.

Section 148.19 of the Customs Regulations is also amended to establish that in cases where a passenger violates section 592 of the Tariff Act, the article which is the subject of the violation shall be seized only if certain conditions are met. As amended, section 148.19 will include a reference to subparagraph (3) of section 162.41(a), which is being added to the regulations to specify the appropriate circumstances for seizure.

The amendment to section 162.41(a) of the Customs Regulations provides that merchandise shall only be seized when the district director is satisfied that the violator appears to be insolvent or may soon become insolvent, the violator or his assets appear to be beyond the jurisdiction of the United States, or, for some other reason, a claim for the domestic value of the merchandise would not protect the revenue.

Because these amendments merely state general policy and impose no additional requirements on the public, notice and public procedure thereon is found to be unnecessary and good cause exists for dispensing with a delayed effective date under the provisions of 5 U.S.C. 553.

DRAFTING INFORMATION

The principal author of these regulations was Marvin M. Amernick, Attorney, Regulations and Legal Publications Division of the Office of Regulations and Rulings, United States Customs Service, Washington, D.C. 20229. However, personnel from other offices of the Customs Service participated in their development, both on matters of substance and style.

AMENDMENTS TO THE REGULATIONS

Sections 148.19, 162.21, and 162.41 of the Customs Regulations (19 CFR 148.19, 162.21, 162.41) are amended in the following manner:

PART 148 - PERSONAL DECLARATIONS AND EXEMPTIONS

The second and third sentences of section 148.19 are amended to read as follows:

§ 148.19 False or fraudulent statement.

* * * In any such case the article involved shall be seized only if one or more of the conditions set forth in section 162.41(a)(3) of this chapter are present, if it is available for seizure at the time the violation is detected, and if such seizure is otherwise practicable, unless the article is in the possession of an innocent holder for value who has full right to possession as against any party to the Customs violation. If seizure is not made, the domestic value of the article, determined in accordance with section 606, Tariff Act of 1930, as amended (19 U.S.C. 1606), shall be demanded from the passenger. * * *

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624))

PART 162 - INSPECTION, SEARCH AND SEIZURE

Section 162.21(a) is amended to read as follows:

§ 162.21 Responsibility and authority for seizures.

(a) *Seizures by Customs officers.* Except as provided for in section 162.41(a), any Customs officer having reasonable cause to believe that any law enforced by the Customs Service has been violated, making any property subject to forfeiture, shall seize such property if available.

Section 162.41(a) is amended to read as follows:

§ 162.41 Merchandise entered by false invoice, declaration, other document or statement, subject to forfeiture.

(a) *Election to proceed against merchandise or value when forfeiture incurred.*

(1) When merchandise or the value thereof is subject to forfeiture under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), including any article seized under the provisions of section 499, Tariff Act of 1930, as amended (19 U.S.C. 1499), the district

director may elect to proceed against the merchandise or its domestic value.

(2) If the merchandise is in the possession of an innocent purchaser, it shall not be seized. In such cases, or when the merchandise is not available for seizure, the district director shall proceed to recover the domestic value.

(3) Merchandise shall only be seized if the district director is satisfied that:

(i) The violator appears to be insolvent or may soon become insolvent;

(ii) The violator or his assets appear to be beyond the jurisdiction of the United States; or

(iii) For some other reason, a claim for the domestic value of the merchandise would not protect the revenue.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624)) (096256)
(ADM-9-03)

VERNON D. ACREE,
Commissioner of Customs.

Approved May 9, 1977,
BETTE B. ANDERSON,
Under Secretary of the Treasury.

[Published in the FEDERAL REGISTER May 17, 1977 (42 FR 25323)]

(T.D. 77-137)

Foreign currencies—Daily rates for countries not on quarterly list

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, Philippine peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 10, 1977.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below. These rates of exchange are published for the information and use of

Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Hong Kong dollar:

April 25, 1977	\$0. 2148
April 26, 1977	. 2148
April 27, 1977	. 2144
April 28, 1977	. 2149
April 29, 1977	. 2147
May 2, 1977	. 2140
May 3, 1977	. 2142
May 4, 1977	. 2141
May 5, 1977	. 2144
May 6, 1977	. 2140

Iranrial:

April 25-May 6, 1977	\$0. 0140
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Philippines peso:

April 25-May 5, 1977	\$0. 1345
May 6, 1977	. 1350

Singapore dollar:

April 25, 1977	\$0. 4057
April 26, 1977	. 4054
April 27, 1977	. 4053
April 28, 1977	. 4057
April 29, 1977	. 4061
May 2, 1977	. 4058
May 3, 1977	. 4060
May 4, 1977	. 4060
May 5, 1977	. 4061
May 6, 1977	. 4058

Thailand baht (tical):

April 25-28, 1977	\$0. 0450
April 29-May 6, 1977	. 0490

(LIQ-3)

JOHN B. O'LOUGHLIN,

Director,

Duty Assessment Division.

(T.D. 77-138)

Foreign Currencies—Certification of Rates

Rates of exchange certified to the Secretary of the Treasury by the
Federal Reserve Bank of New York

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 10, 1977.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified the following rates of exchange which varied by 5 per centum or more from the quarterly rate published in Treasury Decision 77-106 for the following country. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Finland markka:

April 25, 1977.....	\$0. 2472
April 26, 1977.....	. 2467
April 27, 1977.....	. 2467
April 28, 1977.....	. 2470
April 29, 1977.....	. 2468
May 2, 1977.....	. 2465
May 3, 1977.....	. 2461
May 4, 1977.....	. 2458
May 5, 1977.....	. 2458
May 6, 1977.....	. 2455

(LIQ-3)

JOHN B. O'LOUGHLIN,
Director,
Duty Assessment Division.

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1189)

THE UNITED STATES V. CANADIAN VINYL INDUSTRIES, INC., No. 76-11
(— F. 2d —)

1. POLYURETHANE — “ALMOST WHOLLY OF”

Headnote 9(f)(iii), Tariff Schedules of the United States (TSUS), requires that to be “almost wholly of” polyurethane the imported merchandise must have its essential character imparted by the polyurethane, notwithstanding the fact that a nylon backing is also present. The record supports a holding that the polyurethane supplies this essential character. It is the distinctive visual and tactile quality of polyurethane which gives the merchandise its ability to be used as an imitation patent leather.

2. ID. — CLEAR MEANING

We are not prepared to alter the clear meaning of the statute because of an ambiguous legislative history.

3. ID. — LEGISLATIVE HISTORY

We find no basis in the statute or in the legislative history to read the word “article” restrictively. Although finished products such as gloves and luggage are discussed in the legislative history as examples of “articles,” there is no narrowing definition given therein for the term. In our view the films, strips, sheets, etc., enumerated in the superior heading to item 771.40 are all “articles.”

4. CLASSIFICATION OF IMPORTS — COATED FABRICS— ITEM 771.40 TSUS

Imported merchandise, which consists of flexible sheets of laminated material having a polyurethane “skin” on one side and a nylon fabric on the reverse side, and which is made in imitation of patent leather, held properly classified under item 771.40, TSUS.

United States Court of Customs and Patent Appeals, May 12, 1977

Appeal from United States Customs Court, C.D. 4626

[Affirmed.]

Rex E. Lee, Assistant Attorney General, *David M. Cohen*, Chief, Customs Section, *John J. Mahon*, attorneys of record, for appellant.

Barnes, Richardson & Colburn, attorneys of record, for appellee, *Michael Stramiello, Jr.*, *James S. O'Kelly*, of counsel.

[Oral argument on February 2, 1977 by John J. Mahon for appellant and by James S. O'Kelly for appellee]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, and MILLER, *Associate Judges*, Philip Nichols, *Associate Judge*, United States Court of Claims.

NICHOLS, Judge.¹

This appeal is from the judgment of the United States Customs Court, 76 Cust. Ct. 1, C.D. 4626, 408 F. Supp. 1377, sustaining appellee's claim that its imported merchandise is entitled to classification under item 771.40, Tariff Schedules of the United States (TSUS), instead of under item 355.82, TSUS, as classified. Appellee alternatively claimed classification under items 771.42, 774.60 and 355.85. We affirm.

The pertinent statutory provisions involved in this appeal, with rates of duty in effect at time of importation, are as follows:

Tariff Schedules of the United States (19 U.S.C. 1202)

General Headnotes and Rules of Interpretation:

* * * * *

9. *Definitions.* - For the purposes of the schedules, unless the context otherwise requires -

* * * * *

(f) the terms "of", "wholly of", "almost wholly of", "in part of" and "containing", when used between the description of an article and a material (e.g., "furniture of wood", "woven fabrics, *wholly of cotton*", etc.), have the following meanings:

(i) "of" means that the article is wholly or in chief value of the named material;

* * * * *

¹ Judge of the United States Court of Claims sitting by designation pursuant to 28 U.S.C. 293(a).

(iii) "almost wholly of" means that the essential character of the article is imparted by the named material, notwithstanding the fact that significant quantities of some other material or materials may be present; . . .

* * * * *

SCHEDULE 3. - TEXTILE FIBERS AND TEXTILE PRODUCTS

Schedule 3 Headnotes

* * * * *

2. For the purposes of the tariff schedules -

(a) the term "*textile materials*" means-

(i) the fibers (cotton, other vegetable fibers, wool and hair, silk, and manmade fibers) provided for in part 1 of this schedule,

(ii) the yarn intermediates and the yarns provided for in part 1 and part 4 (elastic yarns) of this schedule,

(iii) the cordage provided for in part 2 and part 4 (elastic cordage) of this schedule,

(iv) the fabrics provided for in part 3 and part 4 of this schedule,

(v) braids, as defined in headnote 2 (f), *infra* and

(vi) except as provided by headnote 5, articles produced from any of the foregoing products;

* * * * *

4. For the purposes of the tariff schedules -

* * * * *

(b) In determining the component fibers of chief value in coated or filled, or laminated, fabrics and articles wholly or in part thereof, the coating or filling, or the nontextile laminating substances, shall be disregarded in the absence of context to the contrary.

5. For the purposes of parts 5, 6 and 7 of this schedule and parts 1 (except subpart A), 4, and 12 of schedule 7, in determining the classification of any article which is wholly or in part of a fabric coated or filled, or laminated, with nontransparent rubber or plastics (which fabric is provided for in part 4C of this schedule), the fabric shall be regarded not as a textile material but as being wholly of rubber or plastics to the extent that (as used in the article) the nontransparent rubber or plastics forms either the outer surface of such article or the only exposed surface of such fabric.

Part 4. - Fabrics of Special Construction Or For Special Purposes;
Articles of Wadding Or Felt; Fish Nets; Machine Clothing

* * * * *

Subpart C. - Wadding, Felts, and Articles Thereof; Fish Netting And Nets; Artists' Canvas; Coated or Filled Fabrics; Hose; Machine Clothing; Other Special Fabrics

Subpart C headnotes:

1. The provisions of this subpart do not cover -

* * * * *

(vii) other articles specially provided for in schedule 7 or elsewhere.

2. For the purposes of the tariff schedules -

* * * * *

(c) the provisions in this subpart for fabrics, coated or filled with rubber or plastics material, or laminated with sheet rubber or plastics (items 355.65-85), cover products weighing not over 44 ounces per square yard without regard to the relative quantities of the textile fibers and the rubber or plastics material, but do not cover products weighing over 44 ounces per square yard unless they contain more than 50 percent by weight of textile fibers.

* * * * *

Woven or knit fabrics (except pile or tufted fabrics), of textile materials, coated or filled with rubber or plastics material, or laminated with sheet rubber or plastics:

* * * * *

Of man-made fibers:

355. 81	Over 70 percent by weight of rubber or plastics..	12.5¢ per lb.
355. 82	Other.....	+15% ad val.

* * * * *

SCHEDULE 7. - SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

* * * * *

PART 12. - RUBBER AND PLASTICS PRODUCTS

* * * * *

Subpart B. - Rubber and Plastics Waste and Scrap; Rubber and Plastics Film, Strips, Sheets, Plates, Slabs, Blocks, Filaments, Rods, Tubing and Other Profile Shapes.

* * * * *

Subpart B headnotes:

1. This subpart covers rubber or plastics products (other than waste or scrap) in the following forms:

* * * * *

(b) film, strips, sheets, and plates, all the foregoing (whether or not printed, embossed, polished, or otherwise surface-processed) made or cut into rectangular pieces over 15 inches in width and over 18 inches in length;

* * * * *

Film, strips, sheets, plates, slabs, blocks, filaments, rods, seamless tubing, and other profile shapes, all the foregoing wholly or almost wholly or rubber of plastics:

* * * * *

Not of cellulosic plastics materials:

Film, strips, and sheets, all the foregoing which are flexible:

Made in imitation of patent

771.40

leather-----

4% ad val.

The legislation under which this interrelated maze of provisions was devised was known, somewhat ironically, as the Customs *Simplification Act* of 1954, 68 Stat. 1136, Pub. L. 768, 83rd Cong. 2d Sess. [Emphasis supplied.]

The merchandise, invoiced as "Polyurethane 305," consists of flexible sheets of a laminated material imported in rolls. The material has a glossy polyurethane "skin" on one side and a nylon fabric on the reverse side. The evidence of record (four exhibits and the testimony of three witnesses) unequivocally establishes that the principal and only use of the merchandise is as a substitute for patent leather in the construction of footwear, the polyurethane skin being always outside. Similar material is sometimes used in ladies handbags.

The Customs Court read General Headnote 9(f)(i) in conjunction with the language "of textile materials" in the superior heading to item 355.82 to require that the merchandise be wholly or in chief value of the nylon fabric as a prerequisite for proper classification under item 355.82. General Headnote 10 of the TSUS defines chief value as follows:

(f) an article is in chief value of a material if such material exceeds in value each other single component material of the article.

Since the testimony established the costs of the components of the nylon fabric and polyurethane coating as 51 cents and \$1.13, respectively, the court held that the merchandise did not meet the chief value test and was, therefore, improperly classified. The court then turned to appellee's proposed classification of the merchandise under item 771.40. It held that the merchandise was "almost wholly of" plastics, as the quoted term is defined in General Headnote 9(f)(iii), because the essential character thereof was imparted by the polyurethane "skin." The court also noted the un rebutted testimony of record which established that the merchandise was made in imitation of selected varieties of patent leather in holding that classification under item 771.40 was proper.

Appellant contends that the court erred in applying the chief value test of General Headnote 9(f)(i) to the whole (as opposed to the nylon portion) of the merchandise. It argues that the language of the superior heading to items 355.65-.85, headnotes 2(a)(iv) and 4(b) to schedule 3, headnote 2(c) to part 4C of schedule 3, and amendments to schedules 3 and 7 of the TSUS by the Tariff Schedules Technical Amendments Act of 1965 (TSTAA)² and related legislative history, all specifically provide for the classification of the merchandise under item 355.82.

Appellant also contends that classification under item 771.40 is improper because the polyurethane "skin" does not impart the essential character to the merchandise. Thus, it is not "almost wholly of" plastics within the meaning of General Headnote 9(f)(iii). Alternatively, appellant contends that if the merchandise is described under both items 355.82 and 771.40, then the rule of relative specificity requires classification under item 355.82. Finally, appellant argues that if this court finds both provisions equally applicable, even under the rule of relative specificity, item 355.82 must prevail by virtue of General Interpretative Rule 10(d), which provides:

(d) if two or more tariff descriptions are equally applicable to an article, such article shall be subject to duty under the description for which the original statutory rate is highest * * *

Appellee contends that the Customs Court properly applied a chief value test in holding the merchandise improperly classified under item 355.82. It also contends that the evidence of record supports the court's finding that the merchandise is "almost wholly of" plastics and made in imitation of patent leather. Thus, it argues that classification under item 771.40 was proper. It also contends that if clas-

² 79 Stat. 933, Pub. L. 89-241 (Oct. 1965).

sification under item 771.40 is proper, then headnote 1(vii) to part 4C of schedule 3 excludes classification of the merchandise in part 4C.

Headnote 1(vii) to part 4C of schedule 3 provides the proper starting point for analyzing the present controversy. That headnote excludes from classification in part 4C "other articles specially provided for in schedule 7 or elsewhere." A proper inquiry is whether the Customs Court correctly held that the merchandise is properly classified under item 771.40. If it did, then perforce the merchandise cannot be properly classified under item 355.82.

The evidence and admissions of record unquestionably establish that the imported merchandise is a film or sheet of laminated material in rectangular pieces over 15 inches in width and over 18 inches in length, as prescribed in the superior heading to item 771.40. The polyurethane component is not of cellulosic plastics material as also therein prescribed, and, as noted, the merchandise was made in imitation of patent leather. A crucial question is whether the merchandise is "almost wholly of" polyurethane.^[1] Headnote 9(f)(iii) requires that to be "almost wholly of" polyurethane the merchandise must have its essential character imparted by the polyurethane, notwithstanding the fact that a nylon backing is also present. The record amply supports the Customs Court in holding that the polyurethane supplies this essential character. It is the distinctive visual and tactile quality of polyurethane which gives the merchandise its ability to be used as an imitation patent leather. It is in fact indispensable. In this regard the polyurethane in this case is like the glass water ball in *United China & Glass Co. v. United States*, 61 Cust. Ct. 386, C.D. 3637, 293 F. Supp. 734 (1968). The nylon fabric backing, although imparting several desirable properties to the merchandise, is not indispensable. When footwear is constructed, only the polyurethane is visible. The various flexing and cracking tests which were performed on the merchandise to determine its suitability as an imitation patent leather all related to the durability of the glossy surface. There is no evidence of record showing a like concern over the durability of the fabric backing. In fact, although some form of backing is usually applied to the polyurethane, the fabric backing need not be of nylon; other material can be and is used and sometimes the polyurethane is sold unbacked.

We have reviewed *Marshall Co. v. United States*, 67 Cust. Ct. 316, C.D. 4291, 334 F. Supp. 643 (1971), cited by appellant. See also *A. N. Deringer, Inc. v. United States*, 66 Cust. Ct. 378, C.D. 4218 (1971), and *Larry B. Watson Co. v. United States*, 64 Cust. Ct. 343, C.D. 4001 (1970). Our first observation is that these prior cases are of little help in determining that which supplies the essential character to imported merchandise. These determinations are essentially

factual and vary from case to case. Moreover, *Marshall* is inapposite to the present controversy. In *Marshall* a rayon fabric coated on both sides with rubber was held not to be almost wholly of rubber because the rubber did not impart the essential character to the imported merchandise. The involved merchandise was used in the manufacture of packing materials such as gaskets, washers, and packing heads, and diaphragm material. The court noted that the fabric portion gave burst strength and dimensional stability to the merchandise, preventing the stretching or tearing of the rubber compounds, finding these qualities to be *equally essential* to those imparted by the rubber in view of the ultimate use of the products. Here, as noted, there is no evidence that the polyurethane and the nylon fabric are equally essential and all the evidence is contrary. In our view it is the polyurethane alone which makes the imported merchandise an imitation of patent leather.

Appellant argues that classifying a "supported" plastic under item 771.40 runs counter to the legislative history³ relating to an amendment of that provision. Prior to the enactment of the TSTAA the superior heading to item 771.40 read as follows:

Film, strips, and sheets, all the foregoing which are flexible and unsupported:

The TSTAA amended this superior heading to delete the words "and unsupported." On its face, the amendment was of a broadening nature and caused the amended superior heading to encompass both supported and unsupported rubber or plastics. Generally, a change in the language of a statute indicates an intent to change its meaning. *United States v. American Brown Boveri Electric Corp.*, 17 CCPA 329, T.D. 43776 (1929). However, the legislative history surrounding this amendment states:

Subsection (c) would amend the article description for items 771.40-771.42 which cover rubber and non-cellulosic plastics in the form of film, strips, and sheets "which are flexible and unsupported." It is proposed to strike out the words "and unsupported." These words are surplusage. Where such film, strips, and sheets are supported, textile fabrics are the usual supporting media and such products are provided for in items 355.65-355.85

Despite lending apparent support for appellant's position, we are not prepared to give this report overriding significance. We do not normally use an indication of Congressional intent alone to overcome the clear meaning of the words of a statute. *American Customs Brokg.*

³ Report of the Ways and Means Committee of the House of Representatives, H.R. Rep. No. 342, 80th Cong. 1st Sess. 13 (1965).

Co. v. United States, 58 CCPA 45, C.A.D. 1002, 433 F. 2d 1340 (1970); *C. J. Tower & Sons v. United States*, 41 CCPA 195, C.A.D. 550 (1954); *Yardley & Co. v. United States*, 41 CCPA 85, C.A.D. 533 (1953). Particularly where, as here, the legislative history itself is not entirely free of ambiguity. Although Congress seemingly thought that all textile fabric supported films, sheets, etc. of rubber or non-cellulosic plastics were provided for under item 355.65-.85, the TSUS, particularly headnote 2(c) to part 4C of schedule 3, clearly provides otherwise. "In resolving ambiguity we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." *Cass v. United States*, 417 U.S. 72, 83 (1974) [2]. We are not prepared to alter the clear meaning of the statute because of an ambiguous legislative history.

Appellant also contends that the imported merchandise is not an "article" which is embraced by part 12 of schedule 7, noting that headnote 2(a)(vi) of schedule 3 and headnote 5 of schedule 3 combine to exclude only certain articles made from the fabrics provided for in part 4C of schedule 3 from the textile provisions of schedule 3. As previously noted, headnote 1(vii), which specifically covers part 4C of schedule 3, also excludes from that part "articles specially provided for in schedule 7 or elsewhere." The articles which are excluded from schedule 3 by virtue of the headnotes, says appellant, are finished products such as suitcases, gloves, etc., as discussed in the legislative history cited above concerning the TSTAA which added headnotes 2(a)(vii) and 5 to schedule 3:

Subsection (a) would amend the definition of "textile materials" in headnote 2(a) of schedule 3. Under subparagraph (iv) of headnote 2(a) the fabrics in question are specifically identified as "textile materials". The proposed amendment takes into account the consideration mentioned above that the textile characteristics of these fabrics may be completely lost in the final product. For example, simulated leather suitcases and gloves made of a "supported" vinyl bear no outward resemblance to a textile product. Thus, the proposed amendment of headnote 2(a) would exclude such fabrics from the defined concept of "textile materials" and provide for their being regarded as wholly of rubber or plastics to the extent that, as used in the luggage, gloves, or other article made therefrom, nontransparent rubber or plastics form either the outer surface of the article or the only exposed surface of the fabric.

However, [3] we find no basis in the statute or even in the cited legislative history to read the word "article" in such restrictive manner. Although finished products such as gloves and luggage are dis-

cussed in the legislative history as examples of "articles," there is no narrowing definition given therein for the term. In our view the films, strips, sheets, etc. enumerated in the superior heading to item 771.40 are all articles which are excludable from schedule 3 by virtue of headnote 1(vii) to part 4C of schedule 3, provided they meet the other classification requirements in issue. This view, which is contrary to that expressed by the court in *Marshall*, supra, is reinforced by the Tariff Classification Study, Submitting Report (1960) (TCS), Schedule 7, p. 440, which states:

[T]he proposed provisions of part 12 [of schedule 7] do not distinguish between products on the basis of whether they are or are not made into finished or partly finished articles. Objective distinctions based on specified dimensions have been substituted.

When specifically discussing part 12B of schedule 7 and its related headnotes, the above TCS at 450 states:

The provisions of headnotes 1 and 2 of this subpart treat objectively with the existing problem of differentiating between plastic products which have and have not "been made into finished or partly finished articles." The proposed distinctions are based on dimensions and the type of processing involved.

In view of the above, we hold that the [4] imported merchandise was properly classified under item 771.40 by the Customs Court. As a result, the imported merchandise is properly excluded from part 4C of schedule 3 by virtue of headnote 1(vii) thereto. Our conclusion does not require support of the chief value test which was applied by the Customs Court in holding that classification of the imported merchandise under item 355.82 was improper. Assuming appellant is right that Congress did not mean the chief value test to govern the classification of laminated fabrics of textile and plastic, we think it clearly did mean the "almost wholly" test to govern here, and the contrary conclusion would be anomalous and a trap for unwary importers.

The judgment of the Customs Court is *affirmed*.

MILLER, Judge, dissenting.

As will be developed below, the majority opinion flies in the face of the clearly expressed intent of Congress that products such as the involved merchandise be classified under items 355.65—.85. It refuses to follow that Congressional intent on the basis of a bald assertion, premised on reading a portion of a Congressional committee report out of context, that "the legislative history itself is not entirely free of ambiguity" (the asserted "ambiguity" has nothing to do with

the intent specifically expressed), and, further, by finding one provision of the statute to be "clear," without considering the statute as a whole as required by a basic rule of statutory construction long ago prescribed by the Supreme Court. Such disdain for the Congressional intent to the relationship that should prevail between the coordinate branches of our government—a relationship which this court has long endeavored to maintain by its adherence to the principle that the master rule in the construction of statutes is to so interpret them as to carry out the legislative intent. *Brecht Corp. v. United States*, 25 CCPA 9, 13, T.D. 48977 (1937); *United States v. Clay Adams Co.*, 20 CCPA 285, 288, T.D. 46078 (1932); *Proctor & Gamble Manufacturing Co. v. United States*, 19 CCPA 415, 418, T.D. 45578 (1932); *L. R. Markell v. United States*, 16 Ct. Cust. App. 518, 520 (1929).

Unless there is an express exclusion of a fabric, coated or filled with rubber or plastics material, such as where the fabric is in the form of an "article" specially provided for in Schedule 7,¹ such fabric is properly classified in Schedule 3. Since appellee's merchandise (rolls of laminated fabric) is neither an "article" excluded from coverage under Schedule 3 by Subpart C headnote 1(vii) nor a fabric excluded from items 355.65—.85 by Subpart C headnote 2(c),² the merchandise was properly classified in Schedule 3 and, more particularly, under item 355.85 as contended by appellant.

The majority opinion relies on Subpart C headnote 1(vii) of Part 4 of Schedule 3 in affirming the Customs Court's classification of appellee's merchandise under Schedule 7, basing its reliance on the erroneous conclusion that the merchandise is an "article." It states that there is "no basis" in the statute or the legislative history to read the word "article" to mean a finished product, such as suitcases and gloves. However, Subpart C headnote 1(iv) lists "hair felt, and articles thereof," thus drawing a distinction between an "article" and its basic material. Moreover, the legislative history makes it abundantly clear that "article" means a finished product, as distinguished

¹ See Subpart C headnote 1(vii) of Part 4 of Schedule 3.

² Subpart C headnote 2(c) of Part 4 of Schedule 3 provides as follows:

(c) the provisions in this subpart for fabrics, coated or filled with rubber or plastics material, or laminated with sheet rubber or plastics (items 355.65—.85), cover products weighing not over 44 ounces per square yard without regard to the relative quantities of the textile fibers and the rubber or plastics material, but do not cover products weighing over 44 ounces per square yard unless they contain more than 50 percent by weight of textile fibers.

from the fabric from which it is made. The House Ways and Means Committee Report³ states:

Textile fabrics which have been coated or filled or laminated with rubber or plastics are made to many specifications for a wide variety of uses. . . . The vinyl-covered fabrics (sometimes referred to as "supported" vinyls) are often made in finishes which simulate leather. For some purposes, the rubber or plastics may cover both surfaces of the textile fabric, but for most purposes the rubber or plastics is applied to one surface only. Usually the rubber or plastic is opaque and completely obscures the textile fibers or yarns in the fabrics, but occasionally it is transparent and does not do so. These rubber- or plastic-covered fabrics are used in making *rainwear, hunting jackets, footwear, headwear, gloves, luggage, handbags, furniture, and other articles*. In the final product, the "textile" surface of the fabric may form the outer surface of the article or the only exposed surface of the fabric, thereby lending to the article to the extent used therein the essential characteristic of a woven or knit textile fabric, or, on the other hand, such surface may form the inner surface of the article or be hidden or buried so that it is only the rubber- or plastic-covered surface which gives character to the finished product.

Subsection (a) would amend the definition of "textile materials" in headnote 2(a) of schedule 3. Under subparagraph (iv) of headnote 2(a) the fabrics in question are specifically identified as "textile materials." The proposed amendment takes into account the consideration mentioned above that the textile characteristics of these fabrics may be completely lost in the final product. For example, simulated leather suitcases and gloves made of a "supported" vinyl bear no outward resemblance to a textile product. Thus, the proposed amendment of headnote 2(a) would exclude such fabrics from the defined concept of "textile materials" and provide for their being regarded as wholly of rubber or plastics to the extent that, *as used in the luggage, gloves, or other article made therefrom*, nontransparent rubber or plastics forms either the outer surface of the article or the only exposed surface of the fabric. [Emphasis supplied.]

The phrases, "outer surface of the article" and "inner surface of the article," clearly do not lend themselves to a roll of laminated fabric, but rather to a finished product. The majority says there is no "narrowing definition" given for the term "article," but this need

³ H.R. Rep. No. 342, 89th Cong., 1st Sess. 10-13 (1965).

not be set forth in *ipsis verbis*. It is particularly significant that the listing of specific examples, ranging from *rainwear* to *furniture*, includes only finished products and that it follows the statement that "the textile characteristics of these fabrics may be completely lost in the final product." (Emphasis supplied.)⁴

The majority's quotation from the *Tariff Classification Study*, Schedule 7, 440 (1960) is misplaced. This volume of the Study relates to "Specified products; miscellaneous and nonenumerated products," and there is no indication of any relationship whatsoever with the separate volume of the Study devoted to Schedule 3, "Textile Fibers and Textile Products," in which the meaning of "article" is at issue. In any event, the later (1965) legislative history would control.

The majority quotes from the House Ways and Means Committee Report, *supra* at 12-13, as follows:

Subsection (c) [sic (e)] would amend the article description for items 771.40-771.42 which cover rubber and non-cellulosic plastics in the form of film, strips, and sheets "which are flexible and unsupported." It is proposed to strike out the words "and unsupported." These words are surplusage. Where such film, strips, and sheets are supported, textile fabrics are the usual supporting media and such products are provided for in items 355.65-355.85.

The majority recognizes that this legislative history lends support for appellant's position, but declines to follow it. The majority says the legislative history "is not entirely free of ambiguity," because, though Congress seemingly thought that all textile fabric supported films, sheets, etc. of rubber or non-cellulosic plastics were provided for under items 355.65-.85, Subpart C headnote 2(c) of Part 4 of Schedule 3 "clearly provides otherwise." However, reading the above-quoted portion of the Committee Report *in context* with the Committee's earlier discussion of the *then* existing Tariff Schedules, it is clear that the Committee quite properly stated that all such films, sheets, etc. were *then* (prior to amended) provided for under items 355.65-.85. Not until the bill being considered by the Committee eventually became the Tariff Schedules Technical Amendments Act of 1965, with the amendment adding headnote 2(c), could it be said that headnote

⁴ The Senate Finance Committee Report (S. Rep. No. 530, 89th Cong., 1st Sess. 26 (1965)), commenting on provisions of the House bill agreed to without change, states:

Essentially, the changes [relating to textile fabrics, coated or filled, or laminated, with rubber or plastics] provide that articles *made of this fabric* will be dutiable as textile articles to the extent that the textile fabric forms the outer or exposed surface of the article. Conversely, to the extent the nontransparent rubber or plastics forms the outer surface, the article will be treated as being of rubber or plastics, as the case may be. [Emphasis supplied.]

The reference to "articles made of this fabric" and the phrase "outer or exposed surface of the article" are not compatible with the majority's contention that "films, strips, sheets, etc. enumerated in the superior heading to item 771.40 are all articles which are excludable from schedule 3."

2(c) "clearly provides otherwise." Thus, the legislative history is not at all ambiguous.

The majority says that resort to Congressional intent is not to be had when the meaning of the words of a statute is clear. In fact the meaning of the words of the statute ⁵ is not clear. Rather, the meaning is clearly ambiguous. On the one hand, the superior heading to item 771.40 reads:

Film, strips, sheets, plates, slabs, blocks, filaments, rods, seamless tubing, and other profile shapes, all the foregoing wholly or almost wholly of rubber or plastics:

This is limited by the following inferior heading:

Not of cellulosic plastics materials: Film, strips, and sheets, all the foregoing which are flexible:

On the other hand, the superior heading to item 355.82 reads:

Woven or knit fabrics . . . of textile materials, coated or filled with rubber or plastics material, or laminated with sheet rubber or plastics. . . .

Without more,⁶ it would appear that a roll of laminated fabric might be classified under either item. To clear up such an ambiguity, resort to legislative history is clearly proper. Even without resort to legislative history, under General Interpretative Rule 10(c) the choice would lie with item 355.82 since, as appellant points out, that item contains more difficult requirements to satisfy and more specifically provides for the instant merchandise. Further, under General Interpretative Rule 10(d), the choice would lie with item 355.82 since, as appellant further points out, it commands the higher duty rate.

The majority says that *Marshall Co. v. United States*, 67 Cust. Ct. 316, C.D. 4291, 334 F. Supp. 643 (1971), cited by appellant, is "inapposite to the present controversy." However, the following quotation from the court's opinion shows that *Marshall* is eminently apposite:

We conclude that it was the intent of Congress that coated, filled, or laminated fabric be regarded as other than a textile material only to the extent that nontransparent rubber or plastics forms the outer or exposed surfaces of such fabric as used in the final product made therefrom. *The term "article" as*

⁵ The language of the entire statute is to be considered. *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484 496 (1934); 82 C.J.S. *Statutes* § 345 (1953).

⁶ There is more. Headnote 4(b) to Schedule 3 provides:

(b) In determining the component fibers of chief value in coated or filled, or laminated, fabrics and, articles wholly or in part thereof, the coating or filling, or the nontextile laminating substances, shall be, disregarded in the absence of context to the contrary.

This headnote demonstrates the Congressional intent to eliminate consideration of the value of rubber or plastics coating, filling, or laminating when determining the applicability of a provision.

used in headnote 5, schedule 3 . . . does not embrace an intermediate product, such as the sheeting involved herein, which is material to be used for further manufacture. Therefore, such merchandise may not be deemed wholly of rubber for the purposes of classification under item 771.42

It follows that the sheeting involved herein must be considered a textile fabric, coated with nontransparent rubber, for tariff purposes. Since it is excluded from classification under items 355.65-355.85,[7] it was properly classified as a textile fabric, not specially provided for, of man-made fibers, under item 359.50. [Emphasis supplied. *Id.* at 327, 334 F. Supp. at 651.]

This interpretation of the term "article" in headnote 5 of Schedule 3 would, in the absence of a contrary indication in the statute, apply to "articles" in Subpart C headnote 1(vii).

The judgment of the Customs Court should be reversed.

(C.A.D. 1190)

WALKER INTERNATIONAL CORP. v. UNITED STATES, No. 76-25
(— F. 2d —)

1. REHEARING — DISCRETIONARY WITH CUSTOMS COURT

Customs Court judgment (1) dismissing action pursuant to provisions of Customs Court Rule 8.3(b)(2) due to lack of prosecution without good cause therefor shown and (2) denying plaintiff's motion for rehearing, affirmed.

2. *Id.* — SCOPE OF REVIEW

Appeal from Customs Court judgment, dismissing action pursuant to provisions of Customs Court Rule 8.3(b)(2) due to lack of prosecution without good cause therefor shown and denying plaintiff's motion for rehearing, turns on whether there was a manifest or gross abuse of discretion by Customs Court.

3. *Id.*

Although the statement of an attorney, a member of the Bar admitted to practice before the Customs Court, may ordinarily be sufficient to establish his right to appear on behalf of a litigant, that right is subject to the "diligent supervision" of the court in the management of its business.

4. *Id.*

The rights and duties of a law partnership in winding up its unfinished litigation before the Customs Court is subject to the

⁷ The involved merchandise weighed over 44 ounces per square yard and contained less than 50 percent by weight of textile fibers and was thus excluded by Subpart C headnote 2(c) of Part 4 of Schedule 3, *supra* note 2.

"diligent supervision" of the court in the management of its business.

5. *Id.* - RULE 8.3(b)(2)

Since action was joined in July 1974 and no further proceedings had occurred for some sixteen months, and since law partnership representing appellant had dissolved and there were three separate law firms potentially involved in said partnership's unfinished business, it was within court's discretion to determine which firm, if any, was authorized to represent appellant. Period of sixty days for compliance with court's order and, under Rule 8.3(b)(2), to otherwise show good cause for failure to prosecute was reasonable.

6. *Id.* - SEC. 501 TARIFF ACT OF 1930

Surety companies are not parties for purposes of Section 501 of the Tariff Act of 1930, ch. 497, 46 Stat. 730, as amended by 52 Stat. 1084 and 67 Stat. 517.

7. *Id.*

Not having paid any portion of involved duties of principal, surety companies are not subrogees.

8. *Id.*

Surety companies without standing before Customs Court have no standing before Court of Customs and Patent Appeals under 28 USC 2601.

United States Court of Customs and Patent Appeals, May 12, 1977

Appeal from United States Customs Court, No. R69/5462

[Affirmed.]

David Serko, Gerald B. Horn (Serko & Simon) attorneys of record, for appellant.
Carla A. Hills, Assistant Attorney General, *Barbara Allen Babcock*, Assistant Attorney General, *David M. Cohen*, *Alan L. Langus* for the United States.

[Oral argument on March 30, 1977 by David Serko and Gerald B. Horn for appellant and by Alan L. Langus for appellee]

Before MARKEY, Chief Judge, RICH, BALDWIN, and MILLER, Associate Judges,
SCOVEL RICHARDSON, Associate Judge, United States Customs Court.

MILLER, Judge.

[1] This appeal is from orders of the Customs Court dismissing the above-entitled action and denying plaintiff-appellant's motion for rehearing. [2] The appeal turns on whether there was a manifest or gross abuse of discretion by the Customs Court. *Quigley & Manard, Inc. v. United States*, 61 CCPA 65, C.A.D. 1121, 496 F. 2d 1214 (1974); *Reynolds Trading Corp. v. United States*, 61 CCPA 57, C.A.D. 1120, 496 F. 2d 1228 (1974). We affirm.

Dismissal was pursuant to Rule 8.3(b)(2) of the Customs Court, which provides for involuntary dismissal as follows:

(2) An action in which issue has been joined, but no further proceedings have been instituted for a period of 1 year, may be dismissed by the court on its own motion for lack of prosecution unless good cause is shown for such delay.

On November 20, 1975, the Customs Court issued the following order:

WHEREAS, it appears that issue has been joined since July 1974 and no further proceedings have been conducted and,

WHEREAS, it further appearing that the law firm of Serko & Sklaroff, who formerly represented the plaintiff, are [sic] no longer a partnership engaged in the practice of law, now therefore, it is hereby

ORDERED that a period of sixty days is granted from the date of entry of this Order in which a motion for substitution of counsel may be filed and that in the event that said motion for such substitution is not filed, the Clerk is directed to forthwith dismiss the above entitled action pursuant to the provisions of Rule 8.3(b)(2).

On January 23, 1976, the following Order of Dismissal was entered by the Clerk:

It appearing that a motion for substitution of counsel has not been filed in accordance with an Order of this Court entered on November 20, 1975, the above entitled action is dismissed pursuant to the provisions of Rule 8.3(b)(2).

On February 23, 1976, "PLAINTIFF'S MOTION FOR RE-HEARING" was filed by Serko & Simon, noting that they were "Attorneys for Plaintiff." The grounds for the motion were set forth in an attached affidavit by an associate of the firm of Serko & Simon. Pertinent to the order of dismissal is the following recitation:

That all reasonable efforts were taken to communicate with plaintiff in order to arrange for the Substitution of Attorneys, including numerous letters and telephone calls over a period of more than six months, extending up to the present time; all such communications remain unanswered.

Appellant argues, in effect, that the Customs Court's order of November 20, 1975, was in error because, under the partnership law of the State of New York, the firm of Serko & Sklaroff, although dissolved, had not terminated but was continuing with respect to winding up its unfinished business (including litigation) and other affairs; also, because ethical considerations precluded Serko & Sklaroff

from abandoning its obligations to appellant upon the partnership's dissolution; further, because, without objection by the client or by former counsel, the statement of an attorney, a member of the Bar admitted to practice before the Customs Court, is sufficient to establish that attorney's right to appear on behalf of a particular litigant.

We are unpersuaded by these arguments. [3] Although such a statement by an attorney may ordinarily be sufficient to establish his right to appear on behalf of a litigant, that right is subject to the "diligent supervision" of the court in the management of its business. See *Sweeney v. Anderson*, 129 F. 2d 756, 758 (CA 10 1942).¹ [4] So, too, are the rights and duties of a law partnership winding up its unfinished litigation before the court. As appellee points out, without contravention by appellant, after the dissolution of Serko & Sklaroff there were three separate law firms: Serko & Sklaroff, winding up the partnership's unfinished business and other affairs; Serko & Simon; and Murray Sklaroff, Esq. [5] Since the action was joined in July 1974 and no further proceedings had occurred for some sixteen months, it was within the court's discretion to determine which firm, if any, was authorized to represent appellant. Appellant was given a reasonable period of sixty days to comply with the court's order and, under Rule 8.3(b)(2), to otherwise show good cause for failure to prosecute. Although the aforementioned affidavit recites that "all reasonable efforts were taken to communicate with plaintiff," the court was never so advised during the sixty-day period, and seemingly its order was simply ignored. Accordingly, we hold that there was no abuse of discretion, much less a manifest or gross abuse of discretion, in the court's dismissal.

The affidavit filed in support of the motion for rehearing also contained the following recitations:

8. That upon information and belief, *Walker International Corp.* is no longer engaged in business.

9. That upon information and belief, in the event of the liquidation of the entries encompassed by the above-captioned action, the responsibility for payment of any additional duties owed will fall upon the surety companies under whose bond entry was made.

10. That upon information and belief, those surety companies are New Hampshire Insurance Company, Fireman's Fund Insurance Company, and American Casualty Insurance Company.

¹ The reasoning of the court in *Sweeney* was quoted with approval by this court in *United States v. Chase Kurtz Co.*, 55 CCPA 107, C.A.D. 941, 396 F. 2d 1013 (1968).

11. That the above surety companies are subrogated to the rights and liabilities of *Walker International Corp.* and as such stand in the shoes of plaintiff.

12. That in accordance with the decisions of this Court . . . the sureties, as the parties now responsible for the payment of duties to the Government, are proper parties to assume the responsibility for the continuation of the instant litigation.

13. That by reference to Rule 7.5(a)(5)[²] of the Rules of this Court, the inference is clear that one may substitute parties in litigation before the Customs Court.

(5) Substitution of parties does not affect the right to use depositions previously taken.

14. That in accordance with Rule 24(a)[³] of the Federal Rules of Civil Procedure, the surety companies are entitled, as of right, to intervene in the above-captioned action for the purpose of protecting their interests.

15. That, alternatively, the surety companies are entitled to be substituted as proper parties to this action, in accordance with Rule 25(c)[⁴] of the Federal Rules of Civil Procedure.

16. That New Hampshire Insurance Company and Fireman's Fund Insurance Company have authorized the firm of Serko & Simon to represent their interests in this matter.

17. That filed concurrently herewith is Notice of Consent to Substitution of Attorneys, evidencing such intent.

18. That whereas the rational [sic] for the dismissal of this action was the inability of counsel to file a substitution of attorneys, and whereas said inability has now been overcome, and whereas the failure to reinstate this action will result in extreme hardship to the sureties involved while the reinstatement will in no way burden the defendant, and whereas the sureties are innocent parties to these transactions, and whereas the claim contained in the instant action is a meritorious one, deponent believes that there no longer exists any obstacle to the reinstatement of the instant action.

² Rule 7.5(a)(5) provides:

(5) Substitution of parties does not affect the right to use depositions previously taken.

³ Fed. R. Civ. P. 24(a) provides:

(a) *Intervention of right.*

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

⁴ Fed. R. Civ. P. 25(c) provides:

(c) *Transfer of interest.*

In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. . . .

Thus, the Customs Court was presented with a situation in which one of the three law firms referred to above, Serko & Simon, noted in the motion for rehearing that it was the attorney for plaintiff but, at the same time, stated that plaintiff was "no longer engaged in business" and that "all reasonable efforts were taken to communicate with plaintiff," but without success. No motion was made by the surety companies under Fed. R. Civ. P. 24(a) to intervene in the motion for rehearing or, under Fed. R. Civ. P. 25(c), to be substituted for or joined with Walker for purposes of the motion for rehearing. [6] They were not parties for purposes of the statute in effect at the time of the involved entries.⁵ *Wilmington Shipping Co. v. United States*, 52 Cust. Ct. 650, 654-55, A.R.D. 175 (1964), *aff'd*, 52 CCPA 76, C.A.D. 861 (1965); *United States v. Reedy Forwarding Co.*, 25 Cust. Ct. 469, 471, Reap. Dec. 7919 (1950). [7] Not having paid any portion of the involved duties of the principal, they obviously were not subrogees. See *Fidelity & Casualty Co. v. United States*, 28 Cust. Ct. 103, C.D. 1394 (1952). The Customs Court, in denying the motion for rehearing, clearly treated Walker as the party-plaintiff. [8] Accordingly, the surety companies had no standing as parties before the Customs Court and have no standing here under 28 USC 2601.⁶

Contrary to the affidavit filed in support of the motion for rehearing, the action was dismissed pursuant to Customs Court Rule 8.3(d)(2) for lack of prosecution by plaintiff-appellant, no good cause having been shown therefor. Assuming, *arguendo*, that the claim in the action were meritorious and that dismissal, if affirmed, would result in hardship to the sureties, that hardship cannot be blamed on the Customs Court when no action was taken by the sureties to obtain standing. Authorization by the sureties for the firm of Serko & Simon to represent their interests in the action can hardly be said to have cured the standing problem.

In denying the motion for rehearing, the Customs Court obviously decided that the grounds recited did not set forth good cause for reversing its order of dismissal. We are satisfied that its denial was not a manifest abuse of discretion.

The orders of the Customs Court are *affirmed*.

⁵ Section 501 of the Tariff Act of 1930, ch. 497, 46 Stat. 730, as amended by 52 Stat. 1084 and 67 Stat. 517, provides in pertinent part:

(a) The collector shall give written notice of appraisement to the consignee, his agent, or his attorney. . . . The decision of the appraiser, including all determinations entering into the same, shall be final and conclusive upon all parties unless a written appeal for a reappraisement is filed . . . by the consignee or his agent. . . .

⁶ 28 USC 2601 provides in pertinent part:

(a) A party may appeal to the Court of Customs and Patent Appeals from a final judgment or order of the Customs Court within sixty days after entry of the judgment or order.

(C.A.D. 1191)

WALKER TRADING CORP. v. UNITED STATES, No. 76-26 (— F. 2d —)

1. REHEARING — DISCRETIONARY WITH CUSTOMS COURT

Customs Court judgment (1) dismissing action pursuant to provisions of Customs Court Rule 8.3(b)(2) due to lack of prosecution without good cause therefor shown and (2) denying plaintiff's motion for rehearing, affirmed.

United States Court of Customs and Patent Appeals, May 12, 1977

Appeal from United States Customs Court, R67/4465

[Affirmed.]

David Serko, Gerald B. Horn, (Serko & Simon) attorneys of record, for appellant.

Carla A. Hills, Assistant Attorney General, *Barbara Allen Babcock*, Assistant Attorney General, *David M. Cohen*, Chief, Customs Section, *Alan L. Langus* for the United States.

[Oral argument on March 30, 1977 by David Serko and Gerald B. Horn for appellant and by Alan L. Langus for appellee]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, and MILLER, *Associate Judges*, SCOVEL RICHARDSON, *Associate Judge*, United States Customs Court.

MILLER, Judge.

[1] Identical issues having been disposed of in Customs Appeal No. 76-25, *Walker International Corp. v. United States*, decided this date, the orders of the Customs Court are affirmed in accordance with our opinion in that case.

International Trade Commission,
Investigative No. 337-TA-20

Consolidated Appeal Nos. 77-2 and 77-4
(— F. 2d —)

ROHM AND HAAS COMPANY v. INTERNATIONAL TRADE COMMISSION
AND STANDARD OIL COMPANY (SOHIO)

NIPPON SHOKUBAI KAGAKU KOGYO Co., LTD. v. INTERNATIONAL
TRADE COMMISSION AND STANDARD OIL COMPANY (SOHIO)

1. MOTION TO DISMISS

An ITC order granting a complainant's motion to dismiss and terminate an ITC investigation, which order was based on a deter-

mination that there is no violation of section 337 of the Tariff Act, was necessarily with prejudice to the complainant.

2. ID. SEC. 337(c) OF THE TARIFF ACT.

Standing to appeal a final determination of the ITC under section 337(c) of the Tariff Act necessarily requires a showing of injury in fact.

United States Court of Customs and Patent Appeals, May 12, 1977

Appeal from International Trade Commission, Investigative No. 337-TA-20

[Motion granted and appeals DISMISSED]

Dale H. Hoscheit (Schuyler, Birch, Swindler, McKie & Beckett) *George W. F. Simmons, Rodger L. Tate*, attorneys of record, for appellant.

Warren L. Dean, Jr., Jeffery Lane, attorneys of record, for International Trade Commission.

Ritchie T. Thomas, Eben G. Crawford, Heather Kirkwood, attorneys of record, for appellees.

[On motion by appellees to Dismiss]

Before MARKEY, Chief Judge, RICH, BALDWIN, LANE and MILLER, Associate Judges.

PER CURIAM.

This case involves appeals under 19 U.S.C. 1337(c) filed by Rohm and Haas Company (ROHM) and by Nippon Shokubai Kagaku Kogyo Co., Ltd. (NSKK), for judicial review of the order of the United States International Trade Commission (ITC) entered October 15, 1976, in Investigation No. 337-TA-20. In that proceeding, Standard Oil Company (SOHIO) filed a motion for an order granting SOHIO leave to dismiss without prejudice, terminating the investigation and ordering the return of certain documents. The ITC order stated that the motion to dismiss was granted. The order did not state whether the dismissal was with or without prejudice. The appeals here have now been consolidated. We have before us the motion filed by ITC and SOHIO to dismiss the consolidated appeals, the joint ROHM and NSKK motion for consolidated briefing of the appeals, and the motion to strike filed by SOHIO and the ITC. After due consideration of the ROHM and the NSKK memoranda opposing dismissal, we grant the appellees' motion to dismiss. Therefore, we need not reach the motion to strike and the motion relative to briefing.

In 1975 SOHIO filed a complaint with ITC seeking to exclude from import into this country a certain catalyst alleging that it infringed

SOHIO patents.* The ITC ordered an investigation. During pre-hearing discovery SOHIO determined that ROHM had already imported sufficient catalyst for its Houston plant and that the foreign producer had licensed ROHM to manufacture the catalyst in the United States. SOHIO then filed its motion as noted above. ROHM and NSKK urge that the ITC order is not a determination whether or not there has been a violation of section 337 of the Tariff Act of 1930, *as amended by the Trade Act of 1974*, 19 USC 1337.

Section 337(c) of the Act states that "[a]ny person adversely affected by a final determination of the Commission [ITC] under subsection (d) or (e) [of this section] may appeal such determination to the United States Court of Customs and Patent Appeals." ROHM and NSKK contend that they have been injured because the ITC proceeding was terminated without a final determination as to whether or not section 337 had been violated. We conclude, however, that such a determination was made. The ITC Memorandum Opinion (R. 894) states:

[W]e have concluded from complainant's motion that complainant has conceded that the unfair methods of competition and unfair acts alleged to exist in the importation of certain bismuth molybdate catalysts have no effect or tendency which is to destroy or substantially injure the relevant industry in the United States. On the basis of the above conclusion, we have determined that there is no violation of section 337 in this investigation.

[I] Thus, the ITC made a final determination that the past conduct of ROHM and NSKK did not violate section 337 in that the importations had "no effect or tendency . . . to destroy or substantially injure the relevant industry in the United States." Appellants have not been injured by this determination. The making of such determination is clearly inconsistent with the granting of a motion to dismiss "without prejudice." Therefore, we conclude that the order to terminate the investigation and to dismiss was with prejudice to SOHIO.

In considering the issue of whether or not ROHM and NSKK have the necessary *standing* to further litigate these appeals, we, as an Article III court, are guided by the fact that Article III judicial power exists only to redress or to otherwise protect against injury. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In essence the question of standing is whether the litigant is entitled to have the court decide the dispute. It focuses on the party seeking to get his complaint

*U.S. Patents No. 2,941,007, Issued June 14, 1960, and No. 3,642,930, Issued February 15, 1972.

before a federal court and not on the issues he wishes to have adjudicated.[2] To establish standing, a complaining party must show that he has suffered an injury to himself that is likely to be redressed by a revised decision. *Arlington Heights v. Metro Housing Development Corp.*, — U.S. —, 97 S. Ct. 555 (1977); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Absent such a showing of injury, exercise of power by a federal court would be gratuitous and thus inconsistent with the Article III limitation.

Section 10(a) of the Administrative Procedure Act, 5 USC 702, is relevant. Similar to section 337(c) of the Tariff Act, it states, *inter alia*, that any person *adversely affected* or *aggrieved* by agency action within the meaning of a relevant statute (section 337(c) in the present case) is entitled to judicial review. Adversely affected or aggrieved requires a showing of *injury in fact* as a *sine qua non* for standing. See *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

It is also argued by appellants that since ITC apparently terminated the proceedings without prejudice, SOHIO will be free to institute future proceedings before the ITC if the foreign producer decides to resume sending the catalyst to the U.S. and/or if ROHM decides to resume purchasing such catalyst from abroad. This, appellants contend, constitutes an injury in fact. However, as discussed above the ITC's determination of no section 337 violation is inconsistent with the granting of a dismissal without prejudice. Moreover, attempting to anticipate whether and when ROHM might decide to resume importing and whether and when SOHIO might institute a future proceeding before the ITC takes us into area of pure speculation and conjecture. Such an abstract or speculative injury is insufficient to satisfy the required injury in fact. See *O'Shea v. Littleton*, 414 U.S. 488 (1974).

The cases cited by appellants that relate to dismissals without prejudice in federal district courts are inapposite. Those cases involved dismissals without a determination of the substantive issues whereas in the present case the ITC made a determination that there was no violation of section 337.

The remaining allegations of injury, viz., the expense of recreating attorneys' work product, the cost of future lawsuits, and the chilling effect that threatened future lawsuits might have on a producer's ability to compete with SOHIO fall into the same category as those previously discussed. All are hypothetical and require speculation as to what may or may not happen at some unknown future date.

Finally, it appears to us that the essence of appellants' dissatisfaction with the ITC's final determination may be that the issues of the validity and enforceability of the SOHIO patents were not reached. Since the ITC found in favor of appellants and since injury in fact has not otherwise been established, such dissatisfaction cannot, by itself, satisfy the injury in fact requirement for standing.

The consolidated appeal is *dismissed*.

Decisions of the United States Customs Court

United States Customs Court

One Federal Plaza
New York, N. Y. 10007

Chief Judge
Edward D. Re

Judges

Paul P. Rao
Morgan Ford
Scovel Richardson
Frederick Landis

James L. Watson
Herbert N. Maletz
Bernard Newman
Nils A. Boe

Senior Judge

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, May 9, 1977.

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

G. R. DICKERSON,
Acting Commissioner of Customs.

CUSTOMS COURT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED Par. or Item No. and Rate	HELD Par. or Item No. and Rate	BASIS	PORT OF ENTRY AND MERCHANDISE
P77/55	Re, C.J. May 4, 1977	New York Merchandise Co., Inc.	75-2-00305	Item 737.90 17.5%	Item 731.20 5.5%	Judgment on the pleadings	Los Angeles "Item 30/6933 jackpot bank slot machine battery op- erated game machine"
P77/56	Ford, J. May 4, 1977	Melasco, Inc.	74-11-03167	Item 653.37 9.5%	Item 653.35 5%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Brass candleholders
P77/57	Watson, J. May 4, 1977	Unitron Import Corp.	68/18993	Item 206.65 16 2/3%	Item 206.30 15%	B. A. McKenzie & Co., Inc. v. U.S. (C.D. 3020)	Los Angeles Wooden louvre or shutter doors
P77/58	Landis, J. May 6, 1977	General Instrument Cor- poration	71-9-01122- S, etc.	Item 685.80 11% or 10% (capacitors) Item 687.60 11% or 10% (diodes) Item 684.20 9%, 8%, 7% or	As assessed, <i>supra</i> , with cost or value of U.S. compo- nents deductible from full value of imported merchandise	Agreed statement of facts	New York American goods returned; capacitors, diodes, yokes, flybacks, pincushions, color delay lines; U.S. components

P77/59	Landis, J. May 6, 1977	Mego Corporation	70/27403, etc.	<p>6% (yokes, plucushions; color delay lines and certain flybacks)</p> <p>Item 682.05</p> <p>12.5% (certain flybacks)</p> <p>Without allowance under</p> <p>Item 807.00</p>	<p>pursuant to item 807.00</p>	<p>Agreed statement of facts</p>	<p>New York</p> <p>Toy alphabet blocks, toy building blocks, etc.</p>
P77/60	Watson, J. May 6, 1977	Volkswagen of America, Inc.	73-1-00033	<p>Item 409.00</p> <p>5.5¢ per lb. + 36%; 4.9¢ per lb. + 31%; 4¢ per lb. + 27%; 3.5¢ per lb. + 22.5%</p>	<p>Item 737.55</p> <p>16.5%</p>	<p>U. S. v. Volkswagen of America, Inc. (C.A.D. 1115)</p>	<p>New York; Toledo (Cleveland); Portland, Oreg.; Honolulu; Jacksonville (Flampa); San Francisco; New Orleans; Baltimore; Chicago; Washington, D.C.</p> <p>Benzenoid alkyd resin paints</p>

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